IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DIVISION OF MEDICAID and ROBERT L. ROBINSON, in his Official Capacity as Executive Director of Mississippi Division of Medicaid — **APPELLANTS**

vs.

CROSSGATES RIVER OAKS HOSPITAL (f/k/a RANKIN MEDICAL CENTER), et al. — **APPELLEES**
NO.2013-M-00438-SCT

Consolidated With

ALLIANCE HEALTH CENTER (f/k/a LAURELWOOD CENTER) — **NO. 2013-IA-00436-SCT**

ON INTERLOCUTORY APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

APPELLEES' SUPPLEMENTAL BRIEF PURSUANT TO ORDER ENTERED JANUARY 9, 2015

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Appellees Crossgates River Oaks Hospital (f/k/a Rankin Medical Center), *et al.*, submit this supplemental brief pursuant to the Court's Order entered January 9, 2014.

INTRODUCTION

The Court's January 9, 2015 order directs the parties to submit additional briefs addressing the following questions:

1. Did the twelve cases before the Mississippi Division of Medicaid present questions of fact, questions of law, or mixed questions of fact and law?

2. If the case has presented any fact questions, was a writ of certiorari available under Mississippi Code Section 11-51-95?

3. Does the holding in *Gill v. Mississippi Department of Wildlife Conservation*, 574 So.2d 586, 591 (Miss. 1990), that review of an agency's decision presents a question of law because, "should the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings, subject to modification or reversal" contravene Mississippi Code Section 11-51-93's plain language that "the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings"?

The twelve cases consolidated in this interlocutory appeal presented questions of fact, questions of law, and mixed questions of fact and law. The determination of whether an agency decision is not supported by substantial evidence, although made by the court, is essentially factual in nature. Answering this question involves reviewing factual evidence to determine if substantial factual evidence supported the agency's decision. This Court has recognized that the substantial evidence standard is the standard for reviewing questions of fact, as opposed to the de novo review standard applicable to questions of law. The plain language of Section 11-51-93 limits the circuit court to "examination[s] of questions of law arising or appearing on the face of the record and proceedings." Thus, the language in *Gill v. Mississippi Department of Wildlife*

Conservation, 574 So. 2d at 591, although essentially dicta, was contrary to the plain language of Section 11-51-95.

Section 11-51-95 provides that "[l]ike proceedings as provided in Section 11-51-93 may be had to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not." Thus, writs of certiorari under 11-51-95 first require that the writ be filed for review of a judgment entered by a "tribunal inferior to the circuit court." As explained in the Appellees' principal brief, the Division of Medicaid's Executive Director is not a *tribunal* inferior to the circuit court and, therefore, Section 11-51-95 is not available to review those decisions. Even if the Executive Director were a tribunal inferior as contemplated by Section 11-51-95, the plain language of Section 11-51-93 precludes review of the questions of fact raised by the Appellee Hospitals. This means that a writ of certiorari is not an available "full, plain, adequate and complete remedy at law", and the chancery court has jurisdiction under *Charter Medical Corp. v. Miss. Health Planning and Dev. Agency*, 362 So. 2d 180 (Miss. 1978), and its progeny.

I. Did the twelve cases before the Mississippi Division of Medicaid present questions of fact, questions of law, or mixed questions of fact and law?

With a few notable exceptions, the factual questions presented in these cases are summarized in the "Brief on Common Issues"[1] filed by Appellees Crossgates River Oaks Hospital, et al., *Crossgates Sup. R.*, and the "Brief of Appellant" filed by Alliance Health Center in the chancery court below, *Alliance Sup. R.* The Brief on Common Issues addresses errors that Appellees contend were made in the calculation of their fiscal year 2001 outpatient rates. The Brief of Appellant filed by Alliance summarizes errors made in the calculation of its fiscal year 2001 inpatient rate. Appellees Crossgates River Oaks Hospital, Biloxi Regional Medical

[1] Record citations are as follows: Supplement to Crossgates, et al. record—*Crossgates Sup. R.*; Crossgates et al. record—*Crossgates R.*; Supplement to Alliance record—*Alliance Sup. R.*; Alliance original record—*Alliance R.*

Center, and Northwest Mississippi Regional Medical Center challenge the Division's calculation of their 2001 inpatient rates based on factual and legal errors unique to their circumstances. The facts of these inpatient calculations had not been briefed below at the time the Division filed this interlocutory appeal and are not discussed in the briefs made a part of the record.

In all, approximately 1,281 pages of testimony were received on these issues.

A. Questions of Fact and Law in the *Crossgates, et al*. Consolidated Outpatient Issues

This group of appeals presents the following questions of fact concerning the adjustment of the hospitals' 2001 outpatient rates:

1. Whether the Division erroneously included laboratory charges and radiology charges in the denominator of the outpatient cost-to-charge ratio. *Crossgates Sup. R.* 18-27.

2. Whether the Division's explanation that it was required to include radiology and laboratory charges in the cost-to-charge denominator was justified based upon its desire for consistency. *Id*. 28-37.

3. Whether the "blended amounts" for ambulatory surgical center (ASC) and other diagnostic procedures represented a reasonable estimate of the actual cost incurred by the hospitals when rendering such services. *Id.* 33-34.

On each of these issues, expert witnesses were called by both the Hospitals and the Division. The Division's witness Karen Thomas about the inclusion of laboratory and radiology charges in the denominator. When first asked about this issue, she did not know why they were included: "I explained to you that I don't know why these numbers were not removed." *Crossgates Sup. R*. 23. Later she explained, "There are different kinds of lab and radiology services and I would have to ask medical services what services could be billed under this scenario and how they would be billed to Medicaid and are they included in the fee schedule." *Crossgates Sup. R*. 24. Ultimately, she admitted "I don't know why." *Id*. 25. Ms. Thomas also provided her explanation of why the "blended amounts" for ASC and other diagnostic

procedures represented a reasonable estimate of the hospitals' costs. *Crossgates Sup. R*. 33-36. On this issue, she first admitted that under the Medicare Principles of Reimbursement, costs is defined as "costs actually incurred." *Id*. 32. She then sought to justify the inclusion of blended amounts, which she admitted do not represent actual cost, on the ground that they represent "an approximate estimation of costs," but which is "different than actual costs." *Id*. 33.

The hospitals, in their respective hearings, called either Paul Garrett, CPA, or Shane Hariel, CPA, to testify in support of their respective positions. Messers. Garrett and Hariel testified that inclusion of laboratory and radiology charges in the denominator was factually erroneous and not justified by the Division's explanations. They further testified that the blended amounts for ASC and other diagnostic procedures do not represent the actual costs incurred by the Hospitals because they include a portion of fees and charges. Therefore, they should have been excluded from the numerator of the ratio. They provided detailed factual evidence and calculations supporting their opinions. *Crossgates Sup. R*. 13-14. The lower court will be required to review all of this testimony to determine if the Division's calculations were supported by substantial evidence or arbitrary and capricious. This determination is inherently factual in nature.

The consolidated *Crossgates, et al*. appeals also present the legal question of whether the Division misinterpreted the following language of Attachment 4.19-B to the State Plan:

> The cost to *charge ratio* for outpatient services *will be computed under Title XVIII (Medicare) methodology*, excluding bad debts and other services paid by Medicaid under a different rate methodology (i. e., rural health clinic services and federally qualified health center services).

Crossgates Sup. R. 36. The Division contends that the reference to Medicare methodology requires it to use Medicare "blended amounts" for ASC and other diagnostic procedure services. The Hospitals contend that this means that "cost" under Medicare methodology means actual

cost, and the blended amounts do not represent actual cost. *Id.* In addition, Crossgates, Biloxi Regional Medical Center, and Northwest Regional Medical Center raised the following questions of law:

1. Whether the inpatient adjustment violates Miss. Code Ann. §43-13-117(J), which prohibits cuts to hospital Medicaid payments so long as the assessment provided in §43-15-145(4) is in effect. *Crossgates R*. 7,344-45.

2. Whether the inpatient adjustment and recoupment violated Miss. Code Ann. §43-13-118 and Section 7.03 of the Division's Provider Policy Manual, which limits Medicaid audits to a period of five years. *Id.* 8-9, 344-45.

3. Whether the Lump Sum Settlement violated the hospitals' due process rights under the 14th amendment to the United States Constitution and Art. III, Section 14 of the Mississippi Constitution. *Id.* 10.

B. Questions in the Calculation of Alliance Health Center's Inpatient Rates:

Alliance separately filed its case in the chancery court raising unique factual, as well as legal, questions concerning the calculation of its inpatient rates for fiscal year 2001. The factual questions include:

1. Whether the Division's calculation of Administrative & General costs (shown at column 6, line 6, of Worksheet A) was in error. *Alliance Supp. R*. 8-10.

2. Whether the Division's calculation of Alliance's cafeteria costs (Worksheet A, column 7, line 12, of the Cost Report) was in error. *Id.* 10-12.

3. Whether the Division's calculation of the "trend" and "trend factor" used in the rate calculation was erroneous. *Id.* 12-16.

4. Whether the Division's use of an improper trend factor was justified by its decision to use an inflationary factor of 0.0061. *Id.* 15-16.

Alliance called Paul Garrett, CPA as its primary witness. Mr. Garrett explained that in the calculation of Alliance's inpatient rates for fiscal year 2001 the Division incorrectly calculated and adjusted Alliance's "Administrative & General" costs by $71,425.00. He explained that the Division improperly reduced Alliance's cafeteria costs by $13,689.00.

Finally, he explained that in the rate calculation formula, the Division used a "trend" based on an 18-month period and "trend factor" of 1.5. He explained that the Division should have used a 21-month period and a trend factor of 1.75. Mr. Garrett explained in detail the factual evidence supporting his opinions. *Alliance Sup. R*. 20-24.

Again, the Division called Karen Thomas in an attempt to support its decision. She offered no rebuttal to Garrett's testimony on the Administrative & General or cafeteria costs. She did attempt to explain the Division's position on the trend and trend factor. Although agreeing that the State Plan requires use of a twenty-one month trend factor, *id*. 25, she testified that the use of an 18-month period and a trend factor of 1.5 was proper because the Division used an inflationary factor of 0.0061. *Alliance Sup. R.* 20-28.

The hearing officer found that: "Testimony concerning potential errors does not carry the burden of proving that there are material errors. The decision by DOM was not arbitrary. Instead, it was consistent with the decisions made on the same cost report ten years earlier." *Alliance Sup. R*. 16; *Alliance R.* 16. Alliance contends that when these errors are corrected it is owed $173,629.37 rather than owing the Division $46,018.83. *Id.* 1-2. The court below will be required to review this testimony and evidence to determine whether these factual findings were supported by substantial evidence.

In addition, Alliance raised several questions of law (or mixed questions of law and fact) including:

1. Whether the Division's reliance on data from CostReportData.com was contrary to Attachment 4.19-A of the State Plan providing that "[o]nly the original final settlement will be reviewed and adjustments made therefrom." *Alliance Sup. R*. 26.

2. Whether the CostReportData.com report violated Section 2328 of the Medicare Provider Reimbursement Manual. *Id.* 26.

3. Whether the trend factor used by the Division violated the plain language of Attachment 4.19-A, page 26d. *Id.* 27.

4. Whether Alliance waived its right to challenge the Division's determination. Alliance R. 4.

5. Whether the Division's decision was contrary to Miss. Code Ann. §43-13-118, which limits the Division's ability to audit and adjust rates to a period of five years. *Id.*

6. Whether the Division's decision is in violation of Miss. Code Ann. §43-13-117(J), which prohibits cuts in inpatient payments as long as the hospital assessment provided in §43-13-145(4) is in effect.

II. If the case has presented any fact questions, is a writ of certiorari available under Mississippi Code Section 11-51-95?

This Court has held that an administrative agency's decision that is not supported by substantial evidence is arbitrary and capricious. *Miss. Transp. Comm'n v. Eng'r Assocs., Inc.*, 39 So. 3d 6, ¶13 (Miss. Ct. App. 2009), *rev'd on other grounds*, 39 So. 3d 1 (Miss. 2009) (citations omitted). "Substantial *evidence* means something more than a 'mere scintilla' or suspicion." *Id.* (citation omitted) (emphasis added). It is "such relevant *evidence* as reasonable minds might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted) (emphasis added). "In sum, substantial *evidence* is *evidence* that 'provides an adequate basis of *fact* from which the *fact* in issue can be reasonably inferred.'" *Id.* (citations omitted) (emphasis added). As further explained in part III below, these definitions make clear that the question of whether an agency decision is supported by substantial evidence is inherently factual and based upon a thorough review of relevant evidence.

Section 11-51-93 unambiguously limits judicial review on writ of certiorari to "the *examination of questions of law* arising or appearing on the face of the record and proceedings." (emphasis added). Conversely, an examination of questions of fact is prohibited. Logically,

therefore, a court cannot determine if substantial evidence as defined above supported the administrative decision while at the same time complying with Section 11-51-93. To be sure, this Court in *Gill*, stated that "should the records and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings, subject to modification or reversal." 574 So. 2d at 591. As explained in part III below, Appellant Hospitals submit that this holding was contrary to the unambiguous language of Section 11-51-93.

Thus, even if the Division of Medicaid Executive Director were a tribunal inferior under Section 11-51-95 (he is not), under Section 11-51-93, a writ of certiorari is not available to review the factual questions raised by the Hospitals. Conversely, even if the circuit court could review factual questions in some cases, it cannot in these cases because the Division's Executive Director is not a tribunal inferior. *See Miss. Transp. Comm'n v. Eng'r Assocs., Inc.*, 39 So. 3d at ¶9 ("[W]hether an appeal from a decision of the MTC must be filed by writ of certiorari hinges on whether the MTC is an inferior tribunal as stated in Section 11-51-95 . . . ."). Either way, Section 11-51-95 is not an available full, plain and adequate remedy at law available to review all of the errors raised by the Hospitals.

III. Does the holding in *Gill v. Mississippi Department of Wildlife Conservation*, 574 So. 2d 586, 591 (Miss. 1990), that review of an agency's decision presents a question of law because, "should the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law . . ." contravene Mississippi Code Section 11-51-93's plain language that "the court shall be confined to the examination of questions of law arising or appearing on the face of the record[s] and proceedings"?

This Court is well acquainted with the rules of statutory construction:

> This Court will not engage in statutory interpretation if a statute is plain and unambiguous. *** However, statutory interpretation is appropriate if a statute is ambiguous or is silent on a specific issue. *** In either case, the ultimate goal of this

> Court is to discern the legislative intent. *** The best evidence of legislative intent is the text of the statute; the Court may also look to the statute's historical background, purpose, and objectives. *** If a statute is ambiguous, it is the Court's duty to "carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case."

Miss. Meth. Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid, 21 So. 3d 600, 607-08 (Miss. 2009) (citations omitted). Applying these rules to the Court's third question, the clear answer is "yes."

A. The Court's Decision in *Gill* was Based Primarily on a Question of Law.

Any attempt to answer this question must first begin with this Court's decision in *Gill v. Mississippi Department of Wildlife Conservation*, 574 So. 2d at 586. In 1986, the Department of Wildlife Conservation hired Gill as a conservation officer on a probationary basis. *Id.* at 588-89. After he was fired, Gill appealed his termination to the Mississippi Employee Appeals Board ("EAB") alleging that the grounds given for his termination were a pretext and that he was actually fired for partisan and political reasons. *Id*. at 588. After an evidentiary hearing, the EAB hearing officer agreed with Gill finding that his termination was "the result of influence exerted by persons in political positions of responsibility" and ordered his reinstatement with full back pay and benefits. *Id*. at 589. The DWC appealed to the full EAB which, after a full review of the evidence, reached "[t]he inescapable conclusion . . . that . . . Gill was fired from employment with the [S]tate Department of Wildlife Conservation for partisan and political reasons, which reasons are prohibited by the rules of the State Personnel Board under the laws of the State of Mississippi." *Id.* at 590.

The DWC filed a writ of certiorari with the Hinds County circuit court to challenge the EAB's decision. Based upon the limiting language of Section 11-51-93, "[t]he [c]ircuit [c]ourt did not question any of the EAB's findings of evidentiary or ultimate fact but looked only to

errors [of law] on the face of the record." *Id.* The circuit court concluded that "EAB had impermissibly expanded the statutory definition of political discrimination to include 'political interference' and had thus exceeded the authority the legislature had granted it." *Id.* On appeal, this Court first noted that the limitation of Section 11-51-93 to questions of law arising or appearing on the face of the record "would seem to pretermit any review of the facts and even our normal inquiry whether there may be substantial evidence to support the decision of the Employee Appeals Board." *Id.* at 591. This court then noted –

> On the other hand, should the record and proceedings below reflect a decision wholly unsupported[2] by any credible evidence, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings, subject to modification or reversal. We thus are in our familiar posture of judicial review of administrative processes wherein we may interfere only where the board or agency's decision is arbitrary and capricious, accepting in principle the notion that a decision unsupported by any evidence is by definition arbitrary and capricious.

Id. (citations omitted). On its face, this language conflicts with the plain language of Section 11-51-93: To determine if an agency decision is supported by substantial evidence, a court must necessarily review factual evidence presented in the record and answer a question of fact.

This, however, was not the end of the *Gill* decision. This Court went on to recognize that the circuit court did not question any factual findings of the EAB, stating that "our question on the merits becomes whether there may have been *any error of law* infecting the EAB proceedings." *Id.* at 593 (emphasis added). This Court explained that, "We have today a matter of statutory interpretation, committed initially to an agency within the executive department of the government, here the State Personnel Board and its alter ego, the Employee Appeal Board." "The question is whether EAB has in fact exceeded its authority." *Id.* The Court further noted that it was "[a]ccepting [the] facts as the EAB has found them." *Id.* at 594. Thus, this Court's

[2] Gill appears to be the first case to use the phrase "wholly unsupported by any credible evidence", which is a different and a higher standard than "lack of substantial evidence." It is not clear why this language was used.

actual focus was not on whether substantial evidence supported the EAB decision; it was on the circuit court's determination that the EAB exceeded its statutory authority – a pure question of law. Although this Court in *dicta* noted that substantial evidence supported the EAB decision, *id*. at 591, the crux of the majority decision was clearly stated in the final paragraph of the opinion –

> Beyond that, we stay our hand in the face of SPB's regulatory interpretations of the state civil service statutes proscribing political interference and, as well, EAB's interpretation of both the statutes and SPB's rules in the context of today's case. By a reasonable reading of Sections 25-9-103(e) and (f), plus Section 25-9-145(1), in the setting of Section 25-9-11(c)'s grant of rule-making power, SPB held the power to interpret state employees' right to be secure from the sort of political interference practiced here. SPB has in fact promulgated rules accepting and interpreting these rights. EAB was within its authority, when, after finding the facts as it did, it held the law to protect Gill and afford him a remedy. In sum, no error appears on the face of the record or proceedings below.

Id. at 595. Because this court found that the EAB did not exceed its statutory authority, it reversed and rendered in favor of *Gill*. *Id.*

As seen from the above, the majority decision in *Gill* clearly turned upon a question of law and not a question of fact. The language at issue here—"should the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law"—was not necessary to the Court's decision and should be regarded as dicta.

B. Decisions Citing *Gill* Have Not Addressed Its Impact On The Chancery Court's Jurisdiction under *Charter Medical*.

Of the sixty-three cases citing *Gill* since it was decided, none appear to have addressed its impact on whether a circuit or chancery court has subject matter jurisdiction. Rather, almost all of these cases have cited *Gill* in the context of setting the standard of review for determining

whether to affirm or reverse a circuit court's merits decision. Many of these cases involved review of decisions of the EAB, a body already determined by this Court to be a tribunal inferior. For example, one of the first cases citing *Gill*'s substantial evidence/question of law language was *Mississippi Department of Wildlife Conservation v. Browning*, 578 So. 2d 667. In that case, a game warden was terminated by the Department of Wildlife Conservation ("DWC") because of a knowing acquiescence to his brother's illegal sale of game fish. *Id.* at 667-68. The EAB reversed the decision, ordering that Browning be reinstated. *Id*. at 667. The DWC filed a petition for writ of certiorari to the Hinds County Circuit Court, which affirmed the EAB's reversal. *Id.* The Supreme Court, considering the circuit court's affirmance, first confirmed the circuit court's writ of certiorari jurisdiction over the decision of the EAB, a "tribunal inferior" under 11-51-95. *Id.* at 668. Then, it cited the *Gill* proposition, but only as support for the ultimate issue - "whether or not the decision [of the EAB] was supported by credible evidence." *Id*. at 669 ("As stated in *Gill*, a decision unsupported by the evidence is by definition arbitrary and capricious."). Ultimately, it found that because there was credible evidence to support the DWC's termination of Browning, the EAB's reversal of his termination was arbitrary and capricious. *Id*. *See also, Berry v. Universal Mfg. Co.*, 597 So. 2d 623, 625 (Miss. 1992) (citing *Gill*, 574 So. 2d at 591); *Harper v. North Miss. Med. Ctr.*, 601 So. 2d 395, 397 (Miss. 1992) (citing *Gill,* 574 So. 2d at 591); *Young v. Miss. State Tax Comm'n,* 635 So. 2d 869, 874-75 (Miss. 1994) ("We thus are in our familiar posture of judicial review of administrative processes wherein we may interfere only where the board or agency's decision is arbitrary and capricious, accepting in principle the notion that a decision unsupported by any evidences is by definition arbitrary and capricious.") (quoting *Gill*, 574 So. 2d at 591); *Chandler v. City of Jackson Civil Serv. Com'n*, 687 So. 2d 142, 143-44 (Miss. 1997) (quoting *Gill*, 574 So. 2d at 591); *Hall v. Bd. of Trs. of State Insts. of Higher*

Learning, 712 So. 2d 312, 324-25 (¶ 44) (Miss. 1998) ("Thus, we will find the Board's decision was arbitrary and capricious only where it is unsupported by any evidence.") (citing *Gill*, 574 So. 2d at 591); *Davis v. PERS,* 750 So. 2d 1225, 1230 (¶ 13) (Miss. 1999) ("Should the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law and subject to modification or reversal") (citing *Gill*, 574 So. 2d at 591); *Dept. of Fin. & Admin. v. Reese,* 751 So. 2d 1189, 1193 (¶ 13) (Miss. 1999) ("A decision unsupported by any evidence is by definition arbitrary and capricious.") (citing *Gill,* 574 So. 2d at 591); *Miss. Dep't of Corr. v. Corley,* 769 So. 2d 866, 869 (¶¶ 14, 18) (Miss. 2000) (citing *Gill,* 574 So. 2d at 591); *Bynum v. Miss. Dep't of Educ.,* 906 So. 2d 81, 90 (¶ 15) (Miss. Ct. App. 2004) ("This [limitation to only questions of law] places the circuit court in the 'familiar posture' of judicial review of an administrative agency decision to determine whether that decision was supported by substantial evidence or was arbitrary and capricious.") (citing *Gill,* 574 So. 2d at 591); *Spears v. Miss. Dep't of Wildlife, Fisheries and Parks,* 997 So. 2d 946, 950 (¶ 17) (Miss. Ct. App. 2008) (quoting *Gill,* 574 So. 2d at 591). [3]

Throughout the life of *Gill*, *Charter Medical* and its progeny have coexisted as separate means of reviewing agency decisions. Often the chancery court exercising jurisdiction under *Charter Medical* has answered the question of whether substantial evidence supported the agency's decision, and this Court has either affirmed or reversed those decisions. Thus, in *Electronic Data Systems Corp. v. Miss. Div. of* Medicaid, 853 So. 2d 1192 (Miss. 2003), this Court affirmed the Chancery Court's decision finding that substantial evidence supported the

[3] Two decisions of the Court of Appeals cited *Gill* in the context of subject matter jurisdiction but not with regard to the jurisdictional questions raised in this appeal. *Miss. Dep't of Corr. v. Smith,* 883 So. 2d 124, 126-27 (¶¶ 5-7) (Miss. Ct. App. 2004) ("[T]hough the statute limits review to 'questions of law,' the sufficiency of the evidence is part of that review."); *Miss. Transp. Comm'n v. Eng'g Assocs., Inc.,* 39 So. 3d 6, 8 (¶5-10) (Miss. Ct. App. 2009)(Mississippi Transportation Commission was not an inferior tribunal, and its decision was administrative in nature rather than judicial).

Division of Medicaid's decision to change contractors. *Id.* at 1203-1205. In *Mississippi Transportation Commission v. Engineering Associates, Inc*., 39 So. 3d at 6, the Court of Appeals first found that the chancery court had jurisdiction, rejecting the MTC's contention that Engineering Associates was required to pursue a writ of certiorari. *Id*. at 9. The Court then found that "[t]he MTC's decision to terminate the MOU and to advertise, select, and negotiate a new engineering service contract with another engineering firm was not based on substantial evidence." *Id*. at ¶ 27. *See also Beverly Enters. v. Miss. Div. of Medicaid*, 808 So. 2d 939, 944 (Miss. 2002) ("Medicaid's action here is at the very height of arbitrariness"). Yet, none of these decisions overruled or undermined chancery jurisdiction under *Charter Medical*.

This Court should now take the opportunity to clarify *Gill* in a manner that reconciles it with the plain language of Section 11-51-93 and the clearly established chancery jurisdiction under *Charter Medical.*

C. The unambiguous phrase "questions of law" in Section 11-51-93 means questions that are inherently legal in nature as opposed to factual in nature.

Section 11-51-93 clearly states that the circuit court's review on writ of certiorari is limited to an "examination of questions of law." The plain and unambiguous import of this language is that an "examination of questions of fact or mixed questions of fact and law" is prohibited.

Common examples of questions of law reviewed on writ of certiorari include whether the agency exceeded its statutory authority, *Gill*, 574 So. 2d at 593; whether an agency regulation is contrary to statute, *Miss. Method. Hosp. and Rehab. Center*, 21 So. 2d at ¶28; whether the agency action violates a statutory or constitutional right of the appellant, *Miss. State Bd. of Funeral Servs. v. Coleman*, 944 So. 2d 92, 102 (Miss. Ct. App. 2006); whether the agency correctly interpreted applicable statutes or regulations, *Sierra Club v. Miss. Envtl. Quality Permit*

Bd., 943 So. 2d 673, 678 (Miss. 2006); and whether the appellant timely or properly challenged the agency decision, *Zimmerman v. Three Rivers Planning and Dev. Dist.*, 747 So. 2d 853, 859 (Miss. Ct. App. 1999). Answering these questions may require the court to apply the law to facts as found by the agency, but it does not require an examination of whether substantial evidence supported those factual findings.

As this Court has repeatedly held, whether substantial evidence exists is the standard for reviewing factual determinations made by agencies; it is not the standard for reviewing questions of law. *In re City of Laurel,* 863 So. 2d 968, 971 (Miss. 2004) ("When confronted with rulings on questions of law, the deferential "manifest error/substantial evidence" rule which is ordinarily applied is not proper.") (citing *In re Extension of Boundaries of City of Hattiesburg*, 840 So. 2d 69, 77 (Miss. 2003)); *Matter of Estate of Homburg*, 697 So. 2d 1154, 1157 (Miss. 1997) (when confronted with rulings on questions of law, the deferential "manifest error/substantial evidence" rule which is ordinarily applied is not proper); *Matter of Estate of Mason*, 616 So. 2d 322 (Miss. 1993)("When presented with a question of law, the manifest error/substantial evidence rule has no application and we conduct a de novo review."); *In re Estate of High*, 19 So. 3d 1282 (Miss. Ct. App. 2009)("When reviewing a question of law, "the manifest error/substantial evidence rule has no application[,] and we conduct a de novo review").

Section 11-51-93 unambiguously limits the circuit court's review to "the *examination* of *questions of law*." (Emphasis added). Because the substantial evidence standard applies to the court's review of all questions of fact, interpreting "questions of law" in Section 11-51-93 to include whether substantial evidence supports the agency decision would mean that all fact questions can be examined on writ of certiorari. The phrase "questions of law" will be meaningless. The limitation in Section 11-51-93 to an "examination of questions of law" will

have been completely written out of the statute. *See Allen v. State*, 960 So. 2d 489, 494 ("'The court has no right to add anything or take anything from a statute, where the meaning of the statute is clear.'") (quoting *State v. Traylor*, 56 So. 521 (Miss. 1911)); *Bayer Corp. v. Reed*, 932 So. 2d 786, 789 (Miss. 2006) ("When a statute is unambiguous it is inappropriate for a court to add or take anything away from it.") (citing *Wallace v. Reigh*, 815 So. 2d 1203, 1208 (Miss. 2002)). Moreover, merely because a question of fact is "wholly unsupported" does not change its fundamental factual nature. To the extent that *Gill* held otherwise, it should be overruled as contrary to the plain and unambiguous language of Section 11-51-93.

D. The Difficulty of Using the *Gill* Language to Determine the Existence of Chancery Court Jurisdiction Further Supports the Hospitals' Position.

Another problem exists with the *Gill* language that has not been previously addressed. The majority in *Gill* reasoned that "should the record and proceedings below reflect a decision wholly unsupported by any credible evidence, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings." 574 So. 2d at 591. The problem is that, if this language is used to determine chancery versus circuit jurisdiction, the court must first review all of the evidence before it will know if the decision was "wholly unsupported by any credible evidence" and, therefore, a question of law, or supported by credible evidence and, therefore, a question of fact. Only then would the court know if the issue is a "question of law" that can be addressed by the circuit court writ of certiorari or a "question of fact" that should be heard by the chancery court under *Charter Medical*. Such an in depth inquiry would require preparation of the appeal record, briefing and often oral argument before it can even be determined which court has proper jurisdiction in the first place.

This practical problem further demonstrates that the phrase "question of law" in Section 11-51-93 refers to the nature of the question—legal versus factual—as opposed to the quantum

of evidence supporting the agency decision. It likewise demonstrates that the *Gill* dicta was contrary to the unambiguous language of Section 11-51-93 and not the proper test for determining chancery court jurisdiction under *Charter Medical*.

CONCLUSION

The above answers to the Court's questions are consistent with the language of Section 11-51-93 that precludes an examination of questions of fact, with this Court's prior decisions reviewing agency decisions under *Charter Medical*, and with the Division of Medicaid's prior representations that the Hinds County Chancery Court has jurisdiction to review its decisions in provider appeals. These answers are likewise consistent with this Court's prior decisions holding that the substantial evidence standard applies to questions of fact—not questions of law, as well as the current version of Miss. Code Ann. §43-13-121 vesting the Hinds County Chancery Court with exclusive subject matter jurisdiction over Medicaid provider appeals. The statutory interpretations offered by the Division—designed to deny the Hospitals their day in court—directly conflict with each of these.

To reiterate, the Executive Director of the Division of Medicaid should not be deemed a tribunal inferior when reviewing his own decisions; the Division has repeatedly affirmed the jurisdiction of the Hinds County Chancery Court to hear Medicaid provider appeals; the Legislature has affirmed that court as the court of proper jurisdiction and venue for such appeals; and ample case law supports that court's jurisdiction in these cases. In addition, the limitation of Section 11-51-93 to an examination of questions of law further supports the denial of the Division's motion to dismiss for lack of subject matter jurisdiction. For these reasons and the reasons previously argued, the Appellee Hospitals request that this Court affirm the decision of the Chancery Court below denying the Division's motion to dismiss.

Date: February 9th, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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